(2)

No. 92-135

Supreme Court, U.S.
F I L E D
SEP 1 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH SAN FILIPPO,

Petitioner,

vs.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOHN J. PEIRANO
Counsel of Record
LINDA B. CELAURO
CARPENTER, BENNETT & MORRISSEY
Attorneys for Respondents
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4082
(201) 622-7711

September, 1992

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the court of appeals correctly apply the Court's controlling vagueness doctrine principles articulated in *Arnett v. Kennedy*, 416 U.S. 134 (1974), its progenitors, and its progeny, in determining that the dismissal standard of Rutgers, The State University of New Jersey, of "failure to maintain standards of sound scholarship and competent teaching" is sufficiently clear to give fair warning to a tenured faculty member that he could be discharged: for his exploitative and abusive treatment of research scholars recruited by him from the People's Republic of China to work in his university laboratories; for his abusive treatment of his doctoral advisee-teaching assistant in the presence of students; for his misrepresentations to his research scholar concerning health insurance coverage; for his improper charges against research accounts; for his misrepresentations to the university regarding the credentials of a research scholar working in his university laboratory and paid by a federally funded grant; for his misrepresentations to the university's graduate program regarding the authenticity of a letter of recommendation for an applicant; and for his direct defiance of his department chair's directive issued to protect students.

LIST OF PARTIES

Petitioner:

Joseph San Filippo

Respondents:

Rutgers, The State University*

Michael Bongiovanni

Anthony S. Cicatiello

Adrienne S. Anderson

Donald M. Dickerson

Floyd H. Bragg

Norman Reitman

---

* Rutgers, The State University of New Jersey, has no parent or subsidiary corporations.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	2
A. Proceedings Below	2
B. Facts	4
REASONS FOR DENYING THE WRIT	8
The Third Circuit Decision does not Conflict with the Court's Decisions or the Decision of any Court of Appeals and does not Present any Special and Important Question not Previously Settled by the Court, but Simply Constitutes a Correct Application of the Supreme Court's Controlling Principles Established in *Arnett v. Kennedy*, 416 U.S. 134 (1974), Its Progenitors, and Its Progeny, in Concluding that Rutgers' Dismissal Standard as Applied to Dr. San Filippo is Not Void for Vagueness	8
CONCLUSION	18

TABLE OF AUTHORITIES

	Page
Cases Cited	
Arnett v. Kennedy, 416 U.S. 134 (1974)	i, iii, 1, 8-10
CSC v. Letter Carriers, 413 U.S. 548 (1973)	9, 15
Colten v. Kentucky, 407 U.S. 104 (1972)	10
Connally v. General Construction Co., 269 U.S. 385 (1926)	8, 9
Gentile v. State Bar of Nevada, 111 S.Ct. 2720 (1991)	2, 10-12
Grayned v. City of Rockford, 408 U.S. 104 (1972)	2, 8-11
Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982)	11
Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974)	10
Statutes Cited	
28 U.S.C. §1292(b)	3
42 U.S.C. §1983	2
Rule Cited	
Fed. R. App. P. 27(j)	10

No. 92-135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOSEPH SAN FILIPPO,

Petitioner,

vs.

MICHAEL BONGIOVANNI, ANTHONY S. CICATIELLO, ADRIENNE S. ANDERSON, DONALD M. DICKERSON, FLOYD H. BRAGG, NORMAN REITMAN, individually and as members of the Board of Governors of Rutgers University, and RUTGERS, THE STATE UNIVERSITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the petition for a writ of certiorari. The petition raises no conflict between the Third Circuit's decision and the decisions of the Court or the decisions of any other court of appeals and raises no special and important issue not previously settled by the Court. The petition merely seeks review of the court of appeals' correct application of the Court's controlling vagueness doctrine principles articulated in *Arnett v. Kennedy*, 416 U.S. 134 (1974), its progenitors, and its progeny, in the resolution of the fact-specific issue of whether a state university's dismissal standard

fairly warned a tenured faculty member that he could be discharged for the conduct with which he was charged. Further, contrary to petitioner's assertion (P2),[1] the court of appeals did not refuse to consider the Court's application of the vagueness doctrine in *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991). Rather, the court of appeals, having had the benefit of supplemental submissions on *Gentile*, applied the same vagueness doctrine principles applied in *Gentile* as established by a wealth of other decisions of the Court, including *Grayned v. City of Rockford*, 408 U.S. 104 (1972), cited by both *Gentile*, 111 S. Ct. at 2731, and the court of appeals (PA28).[2]

STATEMENT OF THE CASE

A. *Proceedings Below*

Petitioner Joseph San Filippo ("Dr. San Filippo") was employed as a tenured faculty member in chemistry by respondent, Rutgers, The State University of New Jersey ("Rutgers" or "University"), until he was dismissed, on May 13, 1988, for a "failure to maintain standards of sound scholarship and competent teaching" by Rutgers' Board of Governors[3] (PA7, 44).

On June 13, 1988, Dr. San Filippo instituted this action, under 42 U.S.C. §1983, alleging his dismissal violated several federal and state constitutional rights and asserting a pendent state contract claim (PA46-47). Rutgers and the other respondents moved for summary judgment on all claims (PA47-48). Dr. San Filippo moved for partial summary judgment on his claim that Rutgers' dismissal standard was unconstitutionally vague and on his claim that the dismissal proceeding deprived him of procedural due process (PA47-48). The district court granted Dr. San Filippo's motion on the vagueness claim and denied Rutgers'

---

[1] "P" refers to the Petition.

[2] "PA" refers to the Petition Appendix.

"A" will be used to refer to the Appendix filed with the United States Court of Appeals for the Third Circuit.

[3] The six individually-named respondents are the six members of Rutgers' Board of Governors who voted in favor of Dr. San Filippo's dismissal (PA46

and the other respondents' motion on the vagueness claim, determined the remainder of the liability issues need not be decided, and granted Rutgers' and the other respondents' motion to strike Dr. San Filippo's damages claims for front pay, back pay, research grants, and punitive damages (PA62, 62 n.9).

Pursuant to 28 U.S.C. §1292(b), the district court certified the vagueness issue and the court of appeals granted permission to Rutgers and the other respondents to appeal (PA67, 68).

The Third Circuit succinctly stated: "The sole question before us on this certified appeal is whether the University's regulations were indeed too vague to meet the fair notice requirement incorporated in the due process clause of the Fourteenth Amendment to the Constitution." (PA3-4).

Applying 67 years of the Court's controlling decisions (PA25 to 29), the Third Circuit determined:

> Under these decisions, while Rutgers dismissal regulations are broad and general, they are not unconstitutionally vague. Dismissal for failure to maintain "standards of sound scholarship and competent teaching" does not fail to specify *any* standard for dismissal but rather provides a standard which encompasses a wide range of conduct. We reject the district court's narrow reading of this standard based on the absence of a "catch-all" provision in Rutgers' dismissal regulations, and embrace the "common sense" approach of *Arnett* and its progeny. Professors at Rutgers can evaluate their behavior's conformity to the dismissal regulations. A reasonable, ordinary person using his common sense and general knowledge of employer-employee relationships would have fair notice that the conduct the University charged Dr. San Filippo with put him at risk of dismissal under a regulation stating he could be dismissed for "failure to maintain standards of sound scholarship and competent teaching." Regulation 3.94. He would know that the standard did not encompass only actual teaching or research

> skills. Here all of Dr. San Filippo's charged actions sprang from his role as a faculty member at the University. It is not unfair or unforeseeable for a tenured professor to be expected to behave decently towards students and coworkers, to comply with a superior's directive, and to be truthful and forthcoming in dealing with payroll, federal research funds or applications for academic positions. Such behavior is required for the purpose of maintaining sound scholarship and competent teaching. The academic community can reasonably conclude that otherwise the educational atmosphere is likely to become so tainted and disturbed that it would become impossible to "maintain standards of sound scholarship and competent teaching." *Id.*

(PA30).

B. *Facts*

The sole issue determined by the Third Circuit was that the express language of the University dismissal standard is not unconstitutionally vague as applied to Dr. San Filippo. The only facts relevant to that issue are the language of the dismissal standard, "failure to maintain standards of sound scholarship and competent teaching," and the conduct with which Dr. San Filippo was charged as violating that standard. The detailed charges of misconduct are set out in both lower court opinions (PA10-14, 40-42).

All other "facts" asserted by Dr. San Filippo in the Petition are not relevant to the vagueness issue, were not determined or relied upon by the Third Circuit in reaching its decision, or are vigorously contested by the respondents and have yet to be decided by the district court as they may relate to Dr. San Filippo's claims in the case other than the vagueness claim.

Rutgers' Board of Governors sustained each of the charges found to be true by a hearing panel of Dr. San Filippo's faculty

peers[4] (after a 46-day hearing) and specified how each instance of conduct in the sustained charges constituted a "failure to maintain standards of sound scholarship" (PA14-21), as the Board stated in its decision:

> Sustained Charge 1a concerned the exploitation of Mr. Hetian Gao and Mr. Changhe Xiao, "by directing them or by leading them to believe that they had no choice but to perform domestic work for you, such as garden work and indoor and outdoor cleaning work during the period May through July 1985." As visiting scholars from the People's Republic of China, Messrs. Gao and Xiao came to the United States for further training and study and relied upon Professor San Filippo to be their "intellectual guide and counselor," but instead were subjected to "exploitation" "for his private advantage." Sustained Charge 1d concerned threats and harassment against the visiting Chinese scholars "by [Professor San Filippo] repeatedly stating" that he "would send them back to China" and "by [his] directing abusive language toward them." Sustained Charge 1e concerned Professor San Filippo's interruption of a class taught by graduate student and Teaching Assistant Zong Ping Chen, and his subsequent "unprofessional, threatening and abusive" treatment of her, which treatment was "within the hearing of other individuals, including her students." The other sustained charges, in the Board's view, also constitute a clear "failure to maintain standards of sound

---

[4] All of Dr. San Filippo's faculty peers at Rutgers who reviewed the charges of Dr. San Filippo's misconduct concluded the alleged acts constituted dismissible offenses under Rutgers regulations (A113, 985 n.2, 51, 52-3, 36-8, 892, 940). In so concluding, Dr. San Filippo's peers were performing their responsibilities under the University's dismissal regulations. The University's dismissal regulations provide for recommendations for dismissal to the president of the University by two separate groups of a professor's faculty peers (the academic department and the dean's faculty advisory group) and three academic officers of the university (PA8-9 n.5). After the president issues the formal charges, the professor has a hearing before his faculty peers (PA9 n.5).

scholarship and competent teaching," and therefore also meet the standards for a dismissible offense under applicable University regulations. . .

* * *

. . . All of these charges flow directly out of Professor San Filippo's activities as a scholar and teacher and constitute serious ethical violations of his responsibilities in these areas. Sustained Charge 1c, for example, involving the lack of provision of health benefits despite representations to the contrary, along with Charge 2, in which the facts establish that Professor San Filippo directed an injured Chinese visiting scholar without medical coverage to impersonate one who was so covered, both concern Professor San Filippo's responsibilities as a teacher and scholar. The employment of such visiting scholars in faculty research is a routine part of contemporary university teaching and research, especially in the sciences. The serious lack of ethics in the employer-employee relationship found here constitutes adequate ground for finding a lack of maintenance of "standards of sound scholarship and competent teaching." Especially when foreign nationals are involved, such individuals primarily rely on the guidance of the faculty member concerned to determine the proper parameters of the employment relationship.

The teacher-scholar role also commonly encompasses supervision of other employees. Therefore, sustained Charge 3b concerning Professor San Filippo's attestation that Ms. Marilyn Brownawell, an employee of his, had worked during a week when she had in fact performed no such work falls into this category and evidences a failure to maintain "standards of sound scholarship and competent teaching."

Sustained Charge 4, involving the miscategorization of Peng Zhou as a postdoctoral fellow, concerns the

responsibility of a teacher-scholar to act ethically in regard to the administration of his federal grant and in regard to University policy as respects the guidelines for defining such positions, and likewise can be considered to be a failure to maintain "standards of sound scholarship and competent teaching."

Sustained Charge 5, involving Professor San Filippo's submission of a letter of recommendation on behalf of Peng Zhou under circumstances in which the authorship and authenticity of the submitted material was found to be misrepresented, directly impacts on Professor San Filippo's responsibilities as a teacher who is part of a graduate program which depends in large part on the integrity of the faculty recommendation process. Therefore, his actions in this incident demonstrate a failure to maintain "standards of sound scholarship and competent teaching."

Sustained Charge 6 concerned Professor San Filippo's disobedience of the specific directive of a memorandum addressed to him by his departmental chairman. In that memorandum, Professor Boikess mandated that Professor San Filippo not permit additional graduate students work in his laboratory due to the seriousness of the allegations made against him regarding treatment of such individuals. The source of the directive was well-based concern for the students involved. Professor San Filippo's defiance of that directive was a clear failure to maintain "standards of sound scholarship and competent teaching."

(A1033-34, 1036-38).

REASONS FOR DENYING THE WRIT

THE THIRD CIRCUIT DECISION DOES NOT CONFLICT WITH THE COURT'S DECISIONS OR THE DECISION OF ANY COURT OF APPEALS AND DOES NOT PRESENT ANY SPECIAL AND IMPORTANT QUESTION NOT PREVIOUSLY SETTLED BY THE COURT, BUT SIMPLY CONSTITUTES A CORRECT APPLICATION OF THE SUPREME COURT'S CONTROLLING PRINCIPLES ESTABLISHED IN *ARNETT V. KENNEDY*, 416 U.S. 134 (1974), ITS PROGENITORS, AND ITS PROGENY, IN CONCLUDING THAT RUTGERS' DISMISSAL STANDARD AS APPLIED TO DR. SAN FILIPPO IS NOT VOID FOR VAGUENESS

Dr. San Filippo has failed to identify any conflict between the court of appeals' decision and the Court's controlling decisions establishing, articulating, and applying the vagueness doctrine. Rather, Dr. San Filippo's basis for seeking the Court's discretionary review is his "astonishment" (P21) that the Third Circuit, in applying the Court's well-established vagueness doctrine standards to the case at hand, could possibly find that the dismissal standard of "failure to maintain standards of sound scholarship and competent teaching" fairly warned a university professor that he could be discharged for his complete lack of integrity in dealing with his research workers, research funds, and the university through his abuse of power and authority derived from his role as a teacher and a scholar. Astonishment of a party is not a sufficient basis for a party to seek the Court's exercise of its discretionary jurisdiction.

The purpose of the vagueness doctrine is to avoid "trap[ping] the innocent by not providing fair warning," not to rescue the guilty. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). An enactment is unconstitutionally vague only if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). No one, especially not scholars and teachers of "common intelligence" at a research university, need

guess that a professor's abuses of the extraordinary freedom, power, and authority permitted him in fulfilling his scholarship and teaching obligations – by exploiting and abusing research scholars under his direction and control, abusing his teaching assistant and doctoral advisee in the presence of students, making misrepresentations regarding a research scholar's credentials, making misrepresentations to the university's graduate program, misdealing with federal research funds, and flouting a superior's directive designed to protect students – constitute direct violations of "standards of sound scholarship and competent teaching."

Contrary to Dr. San Filippo's assertion (P24), there was no impropriety in the Third Circuit's reliance upon *Arnett v. Kennedy*, 416 U.S. 134 (1974), in applying vagueness doctrine standards to a dismissal standard for a public employee. *Arnett* did not redefine or reinvent the vagueness doctrine. *Arnett* simply applied the Court's well-established vagueness doctrine standards "in the public employment context" as did the Third Circuit (PA27-28). Both *Arnett*, 416 U.S. at 159, and the Third Circuit (PA27-28) relied upon principles previously articulated by the Court in cases such as *CSC v. Letter Carriers*, 414 U.S. 548, 578-9 (1973) ("there are limitations in the English language with respect to being both specific and manageably brief;" if the prohibitions "are set out in terms that the ordinary person exercising common sense can sufficiently understand and comply with," the enactment "will not be struck down as vague."). The Third Circuit also relied upon identical principles articulated by other controlling decisions by this Court: *Grayned*, 408 U.S. at 110 ("Condemned to the use of words, we can never expect mathematical certainty from our language.") (PA28); *Connally*, 269 U.S. at 391 (the measure of vagueness is whether the language is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application") (PA27).[5]

---

[5] Dr. San Filippo also errs in his assertion that the Court only upheld the *Arnett* standard because there was a federal personnel manual. (P24). As stated by the Third Circuit:

(Footnote continued)

Dr. San Filippo is also incorrect in his assertion that "the Third Circuit completely overlooked and ignored this Court's recent decision in *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991). After oral argument before the court of appeals, Dr. San Filippo's counsel submitted the *Gentile* decision and a July 5, 1991 letter brief discussing *Gentile* to the Third Circuit, pursuant to Fed. R. App. P. 27(j). A July 12, 1991 responding letter brief was submitted by counsel for Rutgers and the other respondents. Therefore, the Third Circuit's failure to cite *Gentile* does not mean that the court did not consider it and did not rely upon the same vagueness doctrine principles relied upon by the Court in *Gentile*. In determining whether the safe harbor provision of a Nevada Supreme Court rule governing attorneys' speech was void for vagueness, the Court in *Gentile* applied the well-established standard of whether the provision provided ' " 'fair notice to those to whom [it] is directed,' " ' quoting from *Grayned*, 408 U.S. at 112. 111 S. Ct. at 2731. Thus, the vagueness doctrine standard applied in *Gentile* was not newly established in *Gentile*. Both the principle of fair notice, for which the Third Circuit cited *Colten v. Kentucky*, 407 U.S. 104, 110 (1972), and the case of *Grayned* were relied upon by the Third Circuit (PA26-27, 28). Hence, the Third Circuit's failure to cite *Gentile* and dozens of other cases in which the Court has applied the vagueness doctrine analysis is not a basis for concluding that the Third Circuit has failed to apply the Court's well-established vagueness doctrine principles.

Moreover, *Gentile* applied established precedent to a set of issues which has no analogy to the issues in the current

---

> We do not believe the manual's existence was the basis for the [C]ourt's holding [in *Arnett*], however. It simply acknowledged the manual in a footnote to demonstrate that it could aid employees in ascertaining the "longstanding principles" of employer-employee relationships to guide them in their behavior. *See Arnett*, 416 U.S. at 160 n.24. Further, the language in the manual shows the breadth of the regulation but does not make it any more specific. *See id.* The court in *Wishart v. McDonald*, 500 F.2d 1110, 1116 (1st Cir. 1974) similarly construed the *Arnett* holding.

(PA28-29 n.15).

matter. The rule challenged in *Gentile* governed "pure speech." 111 S.Ct. at 2724. Thus, the rule in *Gentile* was also challenged as violating the First Amendment. *Id.* Dr. San Filippo's misconduct for which Rutgers dismissed him was not speech. Thus, Dr. San Filippo has not challenged Rutgers' dismissal standard either as overly broad or as directly violating the First Amendment. As the Third Circuit noted:

> In the university context, First Amendment issues sometimes arise with respect to academic freedom. This, however, does not affect our decision today. Dr. San Filippo does not raise an overbreadth challenge to the University regulations. He was not dismissed, nor does he allege that he was dismissed, for any reason relating to anything that could be considered a free expression issue.

(PA26 n.14). Thus, the Petition raises no First Amendment issue. The significance of the distinction in the factual application is the degree of specificity required by the vagueness doctrine standard. The Court has stated that, where a statute regulates speech, a stricter level of precision is required under the vagueness doctrine to ensure that permissible First Amendment freedoms are not inhibited. *Grayned*, 408 U.S. at 109, 109 n.5. Similarly, the Court stated in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-9 (1982):

> The degree of vagueness that the Constitution tolerates — as well as the relative importance of fair notice and fair enforcement — depend in part on the nature of the enactment. . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. . . .
>
> Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

Hence, the stricter degree of precision required of the rule in *Gentile* due to its restriction of speech has no applicability to the dismissal standard involved in this case.

Finally, Dr. San Filippo is correct that the Third Circuit concluded that the express language of the dismissal standard "failure to maintain standards of sound scholarship and competent teaching" is sufficiently clear on its face to have fairly warned Dr. San Filippo that he could be dismissed for his conduct, without the need to resort to "interpretive guides" such as legislative history, other university policies, rules, or regulations, or previous applications (P26, PA22-23, 31). However, Dr. San Filippo is incorrect in his assertion (P26) that if the Third Circuit had resorted to these "interpretive guides," it would have concluded differently.

If the Third Circuit had found it necessary to consider the purported previous applications to Professors Villiers and Leaf (P28-29), it would have found no interpretive guidance. Those professors were charged with violation of a different dismissal standard, "gross neglect of established university obligations appropriate to the appointment," not with "failure to maintain standards of sound scholarship and competent teaching," the dismissal standard applied to Dr. San Filippo (A385, 390).

If the Third Circuit had found it necessary to look to other university policies, rules, and regulations for more explicit definition of "standards of sound scholarship and competent teaching," it would have looked to University Regulation 3.91 wherein Rutgers adopted the code of the nationally organized professoriate to prescribe the standards of sound scholarship and competent teaching expected of Rutgers' faculty (A976-978),[6]

---

[6] University Regulation 3.91 states:

> [E]very member of the faculty of this University is expected . . . . *to maintain standards of sound scholarship and competent teaching*. He shall conduct himself in accordance with the standards of professional ethics set forth in paragraphs I to V, inclusive, of the Statement on Professional Ethics adopted by the

(Footnote continued)

and not, as Dr. San Filippo does (P27-28), to a university policy statement interpreting five promotion criteria: "teaching

---

American Association of University Professors at its annual meeting, April 1966.

Statement on Professional Ethics

"I. The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge, recognizes the special responsibilities placed upon him. His primary responsibility to his subject is to seek and to state the truth as he sees it. To this end he devotes his energies to developing and improving his scholarly competence. He accepts the obligation to exercise critical self-discipline and judgment in using, extending, and transmitting knowledge. He practices intellectual honesty. Although he may follow subsidiary interests, these interests must never seriously hamper or compromise his freedom of inquiry.

"II. As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

"III. As a colleague, the professor has obligations that derive from common membership in the community of scholars. He respects and defends the free inquiry of his associates. In the exchange of criticism and ideas he shows due respect for the opinions of others. He acknowledges his academic debts and strives to be objective in his professional judgment of colleagues. He accepts his share of faculty responsibilities for the governance of his institution.

"IV. As a member of his institution, the professor seeks above all to be an effective teacher and scholar. Although he observes the stated regulations of the institution, provided they do not contravene academic freedom, he maintains his right to criticize and

(Footnote continued)

effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general usefulness to the University." (A405-410).

Finally, if the Third Circuit had found it necessary to resort to the legislative history of the University's regulations, it would have found solid support for its conclusion that the dismissal standard of "failure to maintain standards of sound scholarship and competent teaching" has always applied to all conduct in which a faculty member is empowered to engage by virtue of his professional role as a teacher and scholar. The legislative

---

> seek revision. He determines the amount and character of the work he does outside his institution with due regard to his paramount responsibilities within it. When considering the interruption or termination of his service, he recognizes the effect of his decision upon the program of the institution and gives due notice of his intentions.
>
> "V. As a member of his community, the professor has the rights and obligations of any citizen. He measures the urgency of these obligations in the light of his responsibilities to his subject, to his students, to his profession, and to his institution. When he speaks or acts as a private person he avoids creating the impression that he speaks or acts for his college or university. As a citizen engaged in a profession that depends upon freedom for its health and integrity, the professor has a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom."

(A976-977) (emphasis added). This "Statement on Professional Ethics" adopted by Rutgers' Board of Governors in 1967 was expressly understood by its original propounders to define broadly the responsibilities inherent in teaching and scholarship. The 1940 "Statement of Principles on Academic Freedom and Tenure," by the American Association of University Professors and the Association of American Colleges, and universally recognized as the standard for the profession nationwide, stated: "Academic freedom . . . applies to both teaching and research . . . . It carries with it duties correlative with rights." (A9). The 1970 "Interpretive Comments," issued by these same two bodies for the guidance of the profession in applying the 1940 policy statement, expressly interpreted the teaching and research duties of the members of the professoriate to include adherence to the standards of conduct set forth in the American Association of University Professors' "Statement on Professional Ethics." (A9 n.2, A11, par. 1).

history unequivocally shows that Dr. San Filippo's assertion (P26-27) that a single dismissal standard was changed from "reprehensible and detrimental" conduct to "failure to maintain standards of sound scholarship and competent teaching" is purely and simply factually incorrect. Thus, his interpretation of that nonexistent "fact" as "an effort to restrict the reach of the rules to a narrower compass" (P26) is an interpretation without basis. Since the first Rutgers' Board of Governors enacted the University regulations in 1957, the University regulations have always required a professor to accord his professional conduct to "standards of sound scholarship and competent teaching," and have made a failure to do so a ground for dismissal (A643, 647-648, 650-651, 653-654, 663). The same regulations always have provided also a separate prescriptive and proscriptive standard for a faculty member's conduct as a private citizen. Prior to 1967, the regulations required a faculty member to conform his private conduct to behavior that was not "detrimental and reprehensible to the University," and provided for his dismissal for conduct in his private life "detrimental and reprehensible" to the University (A643, 648). Since 1967, the regulations have required a faculty member to conform his private conduct to "standards dictated by law," and have provided for his dismissal for conduct in his private life that led to a "conviction of a crime involving moral turpitude." (A651, 653, 663).

The Third Circuit did not err in concluding, without relying upon other regulations, legislative history, and prior applications, that professors "exercising common sense can sufficiently understand,"[7] even if not informed by "interpretive guides," the language "standards of sound scholarship and competent teaching" extends to professional life outside the four walls of the classroom and to measures of sound scholarship and competent teaching beyond technical proficiency. Even Dr. San Filippo concedes that the standard of "failure to maintain standards of sound scholarship and competent teaching" would

[7] *CSC v. Letter Carriers*, 414 U.S. at 579.

"cover sex harassment of a student," because the misconduct is made possible by the power the professor derives from the "scholarship or teaching relationship." (P29-30). Having conceded that, logically then, Dr. San Filippo must concede that, in a research institution and especially in the heavily federally-funded research sciences, a professor has extraordinary, unfettered freedom and power over students, employees, and monetary expenditures in the pursuit of scholarly research in the name of academic freedom. The exercise of that freedom and power is central to a professor's role as a teacher and a scholar. The abuse of the freedom and authority that fosters such scholarship and teaching activities is a violation of "standards of sound scholarship and competent teaching."

Each of Dr. San Filippo's transgressions was made possible by his role as a teacher and a scholar, flowing from his supervision of his grant-funded research and from the authority conferred upon faculty members by the University with respect to its graduate program.

So empowered as a teacher and scholar, Dr. San Filippo recruited research scholars from Jilin and Nankai Universities in the People's Republic of China to assist him in his federal grant-supported scholarly research at Rutgers. Upon their arrival in the United States, Dr. San Filippo greeted these visiting scholars with intimidation, verbal abuse, and threats to return them to China in disgrace if they did not submit to his will. In this coercive environment, Dr. San Filippo "invited" these Chinese scholars to his home and assigned them manual labor, including gardening and cleaning, which they performed.

So empowered as a teacher and a scholar, Dr. San Filippo had promised to purchase health insurance with $700 he deducted from a Chinese scholar's (Changhe Xiao) salary. The insurance was not purchased. Thus, when Mr. Xiao fell from a ladder and injured his back while washing the porch and windows of Dr. San Filippo's home on the Fourth of July, he had no medical insurance coverage. After a four-day delay in obtaining medical attention for Mr. Xiao, Dr. San Filippo obtained

emergency hospital treatment by having Mr. Xiao use the insurance card of Mr. Peng Zhou, another research scholar recruited by Dr. San Filippo from Jilin University.

So empowered as a teacher and a scholar, Dr. San Filippo interrupted a laboratory class taught by a teaching assistant, Ms. Zong Ping Chen, his own doctoral student, and verbally berated her in the hearing of her students.

So empowered as a teacher and a scholar, Dr. San Filippo brought Mr. Peng Zhou to Rutgers as a postdoctoral fellow, charging the postdoctoral stipend to a federal grant-funded account, knowing that Mr. Zhou did not have a doctoral degree.

So empowered as a teacher and a scholar, Dr. San Filippo permitted a research technician working in his mass spectrometry laboratory to submit a false time report to Rutgers for wage payment.

So empowered as a teacher and a scholar, Dr. San Filippo submitted a letter of reference to the graduate program, in support of Mr. Peng Zhou's admission, knowing that the letter had not been prepared or signed by the individual whose purported signature appeared on the letter.

So empowered as a teacher and a scholar, Dr. San Filippo permitted three graduate students to work in his laboratory in direct defiance of the department chair's directive which had been issued to protect the students' welfare.

The dismissal standard of "failure to maintain standards of sound scholarship and competent teaching" gave Dr. San Filippo fair warning that he could be dismissed for his misconduct. The Third Circuit correctly applied the Court's well-established vagueness doctrine principles in reaching its conclusion. The issue does not warrant further review by this Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. PEIRANO
Counsel of Record
LINDA B. CELAURO
CARPENTER, BENNETT & MORRISSEY
Three Gateway Center
100 Mulberry Street
Newark, New Jersey 07102-4082
(201) 622-7711
Attorneys for Respondents

September, 1992